

01627

DECISION



*J. Notopoulos
Proc II*

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-187122

DATE: March 23, 1977

MATTER OF: Unique Packaging Sales Corporation

DIGEST:

1. Sole-source procurement for item needed by agency on expedited basis due to critical supply problem created by breakdown in performance by current contractor is justified, since agency has reasonably established that procurement from other than sole-source would likely present unacceptable technical and delivery risks.
2. No demonstration has been made that sole-source contract price is unreasonable; determinations as to reasonableness of prices are responsibility of contracting agency, with which GAO will not interfere unless proven arbitrary or made in bad faith.

Counsel for Unique Packaging Sales Corporation (Unique) has protested a non-competitive sole-source award by the Treasury Department's Assay Office, San Francisco, California of contract TM-SF-76-1858 to Coneco Plastic Division of Continental Equipment Corporation for 2,000,000 packaging sets of containers for coin proof sets.

Counsel informs that the articles have normally been procured through advertised competition and advises that there has always been a number of firms, including Unique, responding under prior solicitations, thereby indicating the availability of adequate competition for the procurement. Counsel contends that as a result of the failure to obtain competition in the instant case, the award was made at a unit price of \$.292 compared to the low bid of \$.228 per unit under a competitive procurement in October 1976.

The record shows that the award at issue was made on May 21, 1976 at a total price of \$584,000, pursuant to 41 U.S.C. § 253(c)(10), which authorizes the use of negotiation where it has been determined that it is impracticable to obtain competition by formal advertising for the property or services. A formal Determination and Findings, issued May 6, 1976, stated that due to production problems under a recently awarded contract, a projected delay of approximately twelve weeks as envisioned which would result in a production stoppage affecting approximately 400 Government employees. It was determined that only Coneco was

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capable of updating the required tooling to produce the coin sets within the required time frame, and due to set backs in the production schedule, use of formal advertising for the procurement was deemed impracticable.

The contracting officer has provided the following account of the circumstances culminating in the sole-source award:

* * * * *

"During the first few months of 1976, the Proof Coin Cases were furnished by Century Molded Plastics under Contract TM-SF-75-1132.

"An invitation for Bid was issued in mid-1975 for 3,000,000 Front Assemblies, Item 1, and 3,000,000 Clear Plastic Backs, Item 2, to be used to package the balance of the 1976 Proof Set requirements. The Abstract of Bids, made at the bid opening, October 31, 1975, records a total of eleven bidders. For present purposes, the most significant bids were:

<u>BIDDER</u>	<u>UNIT PRICE ITEM ONE</u>	<u>UNIT PRICE ITEM TWO</u>	<u>TOTAL</u>
EDI Corporation	\$0.187	\$0.041	\$684,000.00
Coneco Division	0.21375	0.04783	784,740.00
Unique Packaging	0.2255	0.042	802,500.00
Century	0.2455	0.0253	893,400.00

* * * * *

"* * * On December 29, 1975, the United States Assay Office awarded Contract No. TM-SF-76-1086-P to EDI Corporation.

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"If the contract schedule were adhered to, First Article delivery would be March 29, 1976, and if approved fifteen days later, production delivery would begin on June 12, 1976.

"* * * On April 19, as the First Article delivery had still not been made, the United States Assay Office issued a Cure Notice.

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"NECESSITY OF NEGOTIATED PROCUREMENT

"A review of the supply situation on April 20 indicated that supplies on hand plus supplies due from Century Molded Plastics were insufficient for only six more weeks production, that is, to the first of June. Unless supplies were received from EDI Corporation the first of June, production would stop, and workers would have to be furloughed until new supplies arrived.

"* * * There was no possible manner in which EDI Corporation could be expected to begin delivery before the middle of July. Therefore, a six week shutdown of the proof set production line became inevitable, including delays in production and long furloughs of workers.

"To be able to produce the necessary proof sets on order by the end of the year, the United States Assay Office was required to obtain the earliest possible delivery of supplies from a source other than EDI Corporation or face the unacceptable alternative of having to await indefinite delivery of supplies from EDI Corporation. The latter course would have resulted in thousands of dollars in increased labor costs as it would have required additional shifts plus training personnel for the additional shifts and/or scheduling frequent overtime work including Saturdays.

"On April 23, 1976, the United States Assay Office began negotiating with Century Molded Plastics for a supplemental agreement to contract TM-SF-75-1132. As Century was the most recent contractor, and had current molds, it was determined that it would be able to most quickly enter production. This would eliminate possible furloughs and allow the United States Assay Office to more closely adhere to its established production schedule. These negotiations broke down, however, when Century Molded Plastics was unable to achieve a satisfactory agreement with its principal subcontractor.

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"On May 6, a review of the situation indicated a critical supply status. On that date, after a thorough review of all factors, including information from Century Molded Plastics that there had been a total breakdown in negotiations with its principal subcontractor, it was decided to negotiate a sole-source contract with Continental Equipment Company, Coneco Plastics Division. * * *

"NECESSITY OF SOLE-SOURCE PROCUREMENT

"Since the current design for the proof coin cases was introduced in 1973, major design modifications--not necessarily discernible on visual inspection--were implemented, to resolve basic problems with the original prototype: the incomplete sealing; rotation of coins in the sets; and breakage of the hinge-pins which held the cover to the body of the set.

"All three of these problems, evident in the 1973 proof set cases, were partially resolved in 1974, in cases manufactured by Coneco Plastics. Hinge-pins were thickened, thus diminishing breakage in the mails. The clear plastic backs and fronts were thickened to improve sealing, since the earlier version would recess too deeply into the body and impede proper hermetic sealing which is required to prevent coin from tarnishing. Finally, the diameters of the coin-cavities were reduced, so that the coins would not rotate during production or shipping.

"The 1975 proof set cases, made by Century Molded Plastics, incorporated minor modifications to improve on the Coneco Plastics proof set cases.

"Thus, when the need to supplement the EDI Corporation contract became inevitable, Coneco Plastics was the logical choice. Except for Century Molded Plastics, this firm had developed the most recent set of molds and had successfully fulfilled a United States Assay Office contract utilizing them. Since there had been little design change

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between the Government-owned molds developed by Coneco Plastics and those developed by Castury Molded Plastics, their products could be used interchangeably. Coneco Plastics, therefore, clearly had the experience and the capacity to produce an acceptable product on short notice.

"IMPRACTICABILITY OF COMPETITIVE PROCUREMENT

"Any attempt to make a competitive award would have further delayed delivery of the plastic case components. Each potential contractor would have required exact specifications for the molds in order to prepare a bid or proposal. These specifications could not be prepared in less than a week or ten days. Each offeror would then have needed sufficient time to study the specifications in order to bid intelligently. The alternative would have been to make the molds available to all prospective offerors, for individual inspection. In either case, the delays between requesting the proposals and awarding the contract were simply unacceptable. The time constraint did not permit competitive procurement.

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"COST OF THE CONECO CONTRACT

"The negotiated contract with Coneco was at a unit price of \$0.292 per unit, or \$0.234 for each front assembly and \$0.058 for each back. The contract total is \$584,000.00.

"These prices can be compared with the prices elicited during the bidding that led to the EDI contract. Since this contract was smaller than that awarded to EDI, it should be anticipated that the per-unit prices will be higher. Additionally, as this contract was made eight months after the original bids were received, inflationary factors in the costs of labor, materials, and shipping could be expected to increase the price still further. Nevertheless, the negotiated price with Coneco is in line with the per-unit prices offered by the low bidders last October.

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"It should be noted that in the bidding for that larger contract, Unique's bid was \$0.2675 per unit; Century's was \$0.2700; and Coneco's at \$0.2658 was the lowest except for EDI. The price on the negotiated contract, therefore, considering its smaller size and its later date, reflects the trend among the low bidders for the previous contract. Clearly, there has been no radical price increase as is suggested by the present letter of protest."

Counsel for Unique takes exception to a number of matters addressed by the contracting officer, contending that Unique, not Coneco, was the original designer of the molds and that Unique was in possession of a set in good running order used to deliver 500,000 cases under a 1974 contract. It is further maintained that Unique has made timely deliveries in the past and always replaced any breakage without charge.

The contracting officer states that the molds in Unique's possession are not interchangeable with those of Century or Coneco. While conceding that Unique first developed the design concept in 1973, the contracting officer underscores the fact, set out previously herein, that since that time a number of changes have been incorporated into the Century and Coneco molds such as reduction of coin cavity size, increase in thickness of plastic backs, and improvements in the hinge pins in the black plastic cover to decrease the rate of breakage during shipment.

Counsel argues that there was no necessity for other bidders to expend time studying the specifications, but rather they could have calculated prices immediately knowing only shot size and number of pieces produced in each cycle by the mold. Moreover, counsel contends that the contracting officer had at least 18 working days to procure the goods (the amount of time spent negotiating with Century and Coneco from April 23 - May 18, 1976), and the specifications could have been prepared in a week. In the alternative, counsel alleges that a sole-source procurement would have been justified for only a portion of the total requirement, with the balance obtained through formal advertising.

The contracting officer contends, in turn, that even if the Bureau of Mint were to make the Century or Coneco molds available to other producers for inspection and bidding, such

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contractors would need to inspect and become familiar with the molds preparatory to submitting bids; further, a successful bidder working with unfamiliar molds would encounter more difficulties getting such molds into actual operation than Coneco, and first article delivery would be required under those circumstances, further delaying production unacceptably in view of rapidly depleting supplies, the prospective upset of production schedules, and long furloughs of Government employees.

In determining the propriety of a sole-source award, the standard to be applied is one of reasonableness, and unless it is shown that the contracting officer acted without a reasonable basis, we will not object to such an award. Moreover, we have held that an agency's decision to procure on a sole-source basis can be justified where procurement from other sources would present an unacceptable technical risk in view of a tight delivery schedule. North Electric Company, B-182248, March 12, 1976, 75-1 CPD 150, and cases therein. See also Systems Analysis and Research Corporation, B-184222, November 25, 1975, 75-2 CPD 348; Emerson Electric Company, Rantec Division, B-186899, August 10, 1976, 75-2 CPD 143.

We have given careful consideration to counsel's arguments that the Assay Office's delivery schedule requirements could have been accommodated through a competitive procurement. In this regard, we must take account of the contracting officer's position that updating and retooling of the Unique molds, coupled with first article testing and approval would require an unacceptable length of time; that even if the molds currently in the possession of Century and Coneco were furnished to other contractors, due to their sophisticated nature, and the necessity for inspection and adaptation by an unfamiliar offeror as well as the anticipated initial technical problems such an offeror would incur in meeting first article approval would still, in his opinion, involve an unacceptable delay. With regard to counsel's position that at least the latter part of the 2,000,000 could be severed for a competitive procurement, the contracting officer insists that such action would not have been feasible within the required time frame.

It appears from the foregoing that it is at best speculative whether the requirement could have been competitively procured under the attendant circumstances. Based on the record we are without a firm basis to conclude that the decision to

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negotiate sole-source was not made in good faith, or that it was unreasonable to do so in light of existing circumstances. Accordingly, we will not interpose legal objection ~~therein~~.

Concerning counsel's objections that the price paid Coneco was excessive, the contracting officer has determined it fair and reasonable on the basis of the bids received under the previous advertised procurement some eight months prior. Whether a price is reasonable is a determination to be made by the contracting activity, and our Office will not interfere with such a determination absent a showing that it was arrived at arbitrarily, capriciously, or otherwise made in bad faith. See Imperial Products Co., Inc., B-186061, August 11, 1976, 76-2 CPD 155. There has been no such showing here.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States